

THE HONORABLE PALMER ROBINSON

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,

Petitioner,

vs.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Respondent.

NO. 96-2-09623-7 SEA

JOINT MOTION OF WASHINGTON
UTILITIES & TRANSPORTATION
COMMISSION, PUBLIC COUNSEL,
U S WEST, AARP AND TRACER
REGARDING FINAL REFUND
DISPOSITION

(Oral Argument Requested)

JOINT MOTION REGARDING
FINAL REFUND DISPOSITION

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2 **I. RELIEF REQUESTED AND INTRODUCTION**
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4 **A. Background**
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6 Respondent, the Washington Utilities and Transportation Commission ("the
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8 Commission" or "WUTC"), the Office of the Attorney General, Public Counsel Section
9
10 ("Public Counsel")¹, Petitioner U S WEST Communications, Inc. ("U S WEST" or "the
11
12 Company") and intervenors the American Association of Retired Persons ("AARP") and
13
14 Telecommunications Ratepayers Association for Cost-Based and Equitable Rates
15
16 ("TRACER")² respectfully submit this Joint Motion for the final disposition of this case.³
17
18 U S WEST initially filed this action to challenge a rate reduction of \$ 91.5 million per year
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20 that the WUTC had ordered for certain of U S WEST's telecommunications services. The
21
22 Court stayed the WUTC's order reducing rates until the appeal could be resolved, and ordered
23
24 that U S WEST would issue refunds to customers if the appeal were unsuccessful.
25

26 This Court ultimately affirmed the WUTC's order. The Washington Supreme Court
27
28 accepted direct review of this Court's order and extended the stay. Ultimately, the
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30 Washington Supreme Court affirmed this Court's ruling, thereby affirming the rate reduction.
31

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34 ¹ Public Counsel is responsible by statute for representing and appearing for the people of the State of
35 Washington in all actions and proceedings involving any questions under RCW Title 80. RCW 80.01.100.
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37 ² TRACER is an association of large business customers of telecommunications services.
38

39 ³ These parties are hereafter collectively referred to as "the parties." All of the parties to this motion
40 were parties to the prior Superior Court proceedings, the appeal to the Washington Supreme Court and the
41 underlying 1995 rate case before the WUTC. There were also a few additional intervenors in the prior court
42 proceedings that did not participate in the settlement negotiations and are therefore not signatories to this
43 motion, but who are receiving notice of it
44

45 The Commission has approved U S WEST's merger with Qwest Communications International, Inc.
46 and the merger is expected to occur shortly. This agreed motion, entered into by U S WEST prior to the merger,
47 will be binding on the merged company.

1 U S WEST Comm., Inc. v. Washington Utils. & Transp. Comm'n, 134 Wn.2d 74 (1997).

2
3 Subsequently, the Washington Supreme Court directed that this Court resolve all issues
4 regarding the refunds due customers for the 21-month period that the stay was in effect. This
5 Court thereafter established a methodology for notifying ratepayers that refunds would be
6 forthcoming, and for calculating and disbursing the refunds. After U S WEST completed that
7 process, U S WEST filed a final report regarding the disposition of refunds for each category
8 of service. The Commission and Public Counsel then filed notice with the Court that they
9 had some questions regarding the final report.
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17 **B. Matters Remaining at Issue**

18 Some of the checks U S WEST had sent to customers' last known addresses were
19 returned uncashed to U S WEST. The parties agree that these checks are unclaimed funds
20 that should be turned over to the State pursuant to RCW 63.29.080(2).
21

22 In addition, the final amount refunded was approximately \$26 million less than
23 initially expected at the outset of the refund process. U S WEST followed the Court's order
24 regarding the refund process. U S WEST believes that it has fully discharged its refund
25 obligations under this Court's order, and has no further legal obligations to pay further
26 amounts. The WUTC, Public Counsel, AARP and TRACER disagree. For purposes of this
27 motion, the parties have agreed to settle their differences in this regard on the basis that
28 U S WEST fund the programs described herein which are valued at approximately
29 \$26 million.
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41 **II. STATEMENT OF FACTS**

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43 **A. Procedural History**

44 On February 17, 1995, U S WEST filed with the Commission a general rate case
45 proposing an increase for certain telecommunications services.
46
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1 On April 11, 1996, the WUTC rejected U S WEST's proposed tariffs, and instead directed
2 U S WEST to decrease rates by \$91.5 million. Washington Utils. & Transp. Comm'n v. U S
3 WEST Comm. Inc., No. UT-950200, Fifteenth Supplemental Order (W.U.T.C. April 11,
4 1996), at 133-136.
5

6
7
8 U S WEST filed a Petition for Review to this Court, and moved to stay, pending
9 appeal, the Commission's order reducing rates. On April 30, 1996, this Court granted
10 U S WEST's motion and ordered that in the event the appeal was unsuccessful and
11 U S WEST was ordered to refund amounts collected during the stay, U S WEST should make
12 reasonable efforts to make the refunds to customers that paid during the stay. Order on
13 Petitioner's Motion for Stay (dated April 30, 1996), at 3.
14

15
16 After this Court affirmed the WUTC's order, U S WEST petitioned the Washington
17 Supreme Court for direct review and moved for a continuation of the stay. The Supreme
18 Court granted the stay on January 22, 1997. U S WEST Comm. Inc. v. Washington Utils. &
19 Transp. Comm'n, No. 64822-1, Ruling Granting Stay, slip op. at 6 (Jan. 22, 1997).
20

21
22 On December 24, 1997, the Washington Supreme Court affirmed this Court's ruling.
23 U S WEST Comm., Inc. v. Washington Utils. & Transp. Comm'n, 134 Wn.2d 74 (1997).
24
25 Thereafter, the Supreme Court ruled that "the superior court, which entered the initial stay
26 order imposing the refund obligation, should determine any issues related to that obligation."
27 U S WEST Comm. Inc. v. Washington Utils. & Transp. Comm'n, No. 64822-1, Order on
28 Intervenor's Motion for Clarification of Opinion Regarding Stay Order, slip op. at 2 (Feb. 25,
29 1998) (hereafter "Supreme Court Remand Order").
30

31
32 The parties submitted various proposals to this Court regarding how the refund should
33 be implemented. On June 25, 1998, this Court detailed how the refund process would
34 proceed, and how U S WEST would calculate and disburse the refunds to customers. See
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1 Memorandum Order on Methodology to Implement U S WEST's Refund Obligation on the
2 Rate Case (dated June 24, 1998) ("Refund Implementation Order"). The Court also retained
3 continuing jurisdiction and adopted U S WEST's proposal to submit a report to the Court and
4 all parties in 120 days. Id. at 4.⁴
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9 **B. This Court's Refund Methodology**

10 Under the Refund Implementation Order, this Court required U S WEST to make
11 refunds for several services and different customer groups, including: Switched Access
12 Service refunded primarily to interexchange carriers; Business Basic Exchange Services
13 (including Complex Business, PBX trunks, Semi-Public Access Lines, Public Access Lines,
14 Toll Trunks and Hotel Trunks, Simple Business, Digital Switched Services trunks, Centrex
15 Plus Network Access Registers ("NARS") and Centrex Plus NAR Equivalents); Hunting
16 Service; Local Measured Service Usage; and Message Toll Service.
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25 Determining how to make the refunds was not a simple matter. Many different
26 services were involved. The rates charged for specific services differed by customer location.
27 The services customers subscribed to differed, and customers had differing usage of any
28 given service. In addition, customers may have changed services during the stay. Not all
29 customers at the time of the refund were customers at all times during the stay. Not all
30 customers who were customers at the beginning of, or sometime during, the stay were
31 customers of U S WEST at the time of the refund.
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44 ⁴ During the course of the refund process, U S WEST submitted four refund status reports to this Court
45 that detailed the refunds made, and the refund process. See Affidavit of Theresa A. Jensen (dated October 19,
46 1998); Affidavit of Theresa A. Jensen Re: Refund Status (dated January 15, 1999); U S WEST's Status Report
47 on Refund (dated April 15, 1999); and Affidavit of Theresa A. Jensen Re: Final Report of U S WEST Refund
Status, (dated July 30, 1999).

1 The parties made a number of proposals to the Court as to how the refunds should be
2 made. The Court ultimately fashioned an order requiring U S WEST to make "reasonable
3 efforts to make the refund to customers that paid during the stay." Refund Implementation
4 Order at 1.
5
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7
8 The Court also directed how U S WEST would be required to attempt to reach
9 customers that had moved or discontinued service. Current customers received bill credits
10 and/or checks. For former customers, and to account for the varying circumstances described
11 above, the Court required that U S WEST advertise for a specified time period in certain
12 newspapers that have the largest circulation in the state.⁵
13
14

15 The Court made specific rulings on how refunds would be made for each service. For
16 some services, the Court adopted U S WEST's proposals to make refunds based on certain
17 assumptions or averages. For example, for complex business, PBX trunks, semi-public
18 access lines, public access lines, hunting service, toll trunks and hotel trunks, U S WEST
19 made refunds on the assumption that each customer had the service for the full 21-month
20 period of the stay, even though not all did, because it was administratively simpler to refund
21 based on this assumption.⁶ See Summary of U S WEST Final Refund Proposal (dated
22 April 7, 1998) at 4-5; Refund Implementation Order at 4-5.
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40 ⁵ Pursuant to the Court's Refund Implementation Order, ¶ 5, the Commission reviewed and approved
41 the advertisements prior to publication.
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43 ⁶ For such customers that did not have the service in place for the entire stay period, this methodology
44 was expected to, and did, result in greater refunds than their actual usage would have justified. While U S
45 WEST processed the refunds automatically, all customers had the option to request that a customer-specific
46 refund be calculated manually for their accounts, and several customers requested this. See Affidavit of Theresa
47 A. Jensen (dated June 27, 2000) (hereafter "Jensen Aff."), ¶¶ 11, 18.

1 Similarly, for toll service and local measured service, refunds to current customers
2 were not based on each customer's actual billed charges. Toll rates charged to customers
3 during the stay varied by time of day, day of week, and according to each customer's toll plan.
4 The Court ordered that the refund for toll service be made by establishing an average rate
5 based on revenues and overall minutes of use and that this averaged per minute of use credit
6 be refunded to customers based on their actual minutes of use during the stay period. See
7 Refund Implementation Order at 6; Summary of U S WEST Final Refund Proposal at 7.
8

9 For local measured service, U S WEST did not have data for the complete period of
10 the stay. The Court ordered that these refunds be based on an estimate of usage for the stay
11 period which took a customer's three months of usage prior to the expiration of the stay, and
12 extrapolated that over the entire 21-month period. Refund Implementation Order at 5;
13 Summary of U S WEST Final Refund Proposal at 7.
14

15 **C. This Court Retained Jurisdiction Over the Refund Process**

16 According to the Refund Implementation Order:

17 This Court retains jurisdiction over any money which remains
18 unclaimed and adopts U S WEST's proposal that it submit a report to
19 the Court and all parties 120 days after the date of this order. The
20 Court will decide later if an audit is necessary.
21

22 Refund Implementation Order at 4. The Supreme Court's Remand Order provided that "the
23 Superior Court, which entered the initial stay order imposing the refund obligation, should
24 determine any issues related to that obligation." Supreme Court Remand Order at 2.
25

26 **D. The Unresolved Matters**

27 **1. Some Refund Checks Mailed to Former Customers Have Been**
28 **Returned Uncashed**

29 Approximately 23,000 refund checks mailed to former customers were returned to
30

1 U S WEST uncashed. The aggregate amount of these checks is approximately \$1,658,038.
2
3 See Jensen Aff., ¶¶ 15 - 16. U S WEST had traced these refunds to specific customers, and
4
5 had sent the checks to the addresses in U S WEST's records for these customers. In its Final
6
7 Status Report, U S WEST indicated that it would treat these returned checks as unclaimed
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9 property that has been abandoned, and would turn over these funds to the Department of
10
11 Revenue in accordance with RCW 63.29 et seq. See Final Report of U S WEST Refund
12
13 Status (7/30/99) at 4.⁷

14
15 **2. The Final Amount Disbursed Was Approximately \$26 Million**
16 **Less Than Expected**
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18 In addition, the final refund disbursed was approximately \$26 million less than
19
20 U S WEST expected it would be at the outset of the refund process. U S WEST believes that
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22 this differential relates to two sources. First, as described above, for many services, the
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24 actual amounts refunded were estimated or extrapolated and did not necessarily return the
25
26 precise monies paid in by each customer. In many cases, customers received more than what
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28 they originally paid based on the Court's direction. Second, there was a change in customer
29
30 base between May 1996 and July 1999, the time between when the stay commenced and
31
32 when U S WEST filed its Final Report on the status of the refund. U S WEST believes that
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34 this change in customer base is primarily attributable to business customers, and is a result of
35
36 various business services being discontinued by some customers over the 21-month period of
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41 ⁷ U S WEST regularly receives returned checks as a normal function of its business. U S WEST is
42 presently holding \$1,837,967 in unclaimed checks that were returned to the Company during the relevant time
43 period. The vast majority of these are related to the refund. A small portion are other checks that were returned
44 unclaimed during the same time period. U S WEST estimates, based on the historical pattern of returned checks
45 it receives, that about \$179,829 of this amount is not refund-related, and that the balance, approximately
46 \$1,658,038, represents returned checks relating to the refund. See Jensen Aff., ¶ 16. It is unnecessary to obtain a
47 precise breakdown because U S WEST is required by law to turn over to the State the returned unclaimed
checks whether or not they pertain to the refund.

1 the stay.⁸ This \$26 million has not been, and cannot practicably be, allocated to any specific
2 customers. See Jensen Aff., ¶¶ 17 - 25.
3

4 U S WEST followed the Court's order regarding how to disburse the refund, and
5 believes that it has no further obligation to pay any amount beyond what it has already
6 disbursed. The WUTC, Public Counsel, AARP and TRACER disagree. For purposes of this
7 motion, the parties have agreed to settle their differences in this regard and propose that the
8 remaining issues be resolved by U S WEST funding the programs described herein at a cost
9 of approximately \$26 million. The parties believe that this is the best use of such funds under
10 the cy-pres doctrine.⁹
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18 III. STATEMENT OF ISSUES

19 Whether the Court will approve the Joint Motion which requests:
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21 1. That the 23,000 refund checks, totaling approximately \$1,658,038, which
22 were allocated to specific customers, but returned uncashed to U S WEST, escheat to the
23 state as abandoned property in accordance with RCW 63.29 et seq.
24

25 2. That issues pertaining to the differential between the final refund amount and
26 that originally expected be settled by U S WEST contributing \$26 million to fund the
27 programs described herein.
28
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35 IV. EVIDENCE RELIED UPON

36 In addition to the pleadings and orders contained in the Court file, the parties rely on
37 the Affidavit of Theresa A. Jensen (dated June 27, 2000), submitted herewith.
38
39
40

41 _____
42
43 ⁸ Commission Staff and Public Counsel have not performed a full audit, but are satisfied for purposes
44 of this motion that the differential is \$26 million.
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46 ⁹ This agreement is made for purposes of this motion only, and is subject to the conditions set forth in
47 footnote 10, infra.

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V. AUTHORITY

A. The Returned Refund Checks Are Presumed Abandoned and Subject to the Custody of the State Under RCW 63.29.080(2)

The 23,000 refund checks, mailed to specific customers, were returned uncashed. These unclaimed refund checks are subject to RCW 63.29.080(2). They have "remained unclaimed by the person appearing on the records of the utility entitled thereto." RCW 63.29.080(2). Accordingly, this Court should approve the proposed disposition that these unclaimed refunds are presumed abandoned and escheat to the State, and U S WEST will turn them over to the State.

B. \$26 Million Should Be Contributed to Fund the Programs Set Forth in the Joint Proposal¹⁰

1. This Court's Jurisdiction Is Expressly Authorized by the Washington Supreme Court and This Court's Prior Orders

The matter at issue is subject to this Court's jurisdiction. All refund monies arose as a direct result of this Court's, and the Washington Supreme Court's, stay orders. The Washington Supreme Court remanded "to the Superior Court to decide all issues regarding

¹⁰ For purposes of this motion, the parties have stipulated that the differential is \$26 million, and that U S WEST will fund the programs described herein that are valued at that amount as a full and final settlement of U S WEST's refund obligations in this action. The parties agree that this will fully discharge all of U S WEST's obligations in this case and that U S WEST does not consent to, nor will the parties to this motion seek to impose (1) any other or higher payments, value, or program funding (2) any additions to that amount, value, or program funding (except for interest accrued on escrow), or (3) any additional or different obligations on U S WEST. U S WEST's agreement to this motion is conditioned on the full and final discharge of all of U S WEST's obligations through funding of the programs described herein. Should this not be approved as U S WEST's full and complete liability, U S WEST reserves its rights to withdraw its agreement to fund these programs and to contest any obligation for any refund or other liability in this case beyond what U S WEST has already paid to date. In the event this agreement is not approved, the other parties thereto likewise reserve all rights with respect to the refund obligation. Should any party charged with responsibility for carrying out this settlement fail to comply with any court order approving or implementing this agreement, all other parties reserve all their rights to seek appropriate remedies.

1 U S WEST's obligation to make refunds of amounts collected under the stay orders of the
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3 Superior Court and this Court." Supreme Court Remand Order at 3. In issuing its order
4
5 regarding how the refunds would be processed, this Court likewise indicated that it retained
6
7 jurisdiction. Refund Implementation Order at 4.
8

9 **2. The Uniform Unclaimed Property Act Does Not Apply**

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11 No Washington statute controls the resolution of this issue. Accordingly, this Court
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13 should determine the issue pursuant to its initial reservation of jurisdiction, and the
14
15 Washington Supreme Court's directive that this Court resolve any issues relating to the
16
17 refund obligation.
18

19 The Uniform Unclaimed Property Act, RCW 63.29.010, et seq. ("the Act"), requires
20
21 that certain unclaimed property be presumed abandoned and turned over to the state. As
22
23 demonstrated below, the Act does not apply here where any remaining funds have not, and
24
25 cannot practicably be, allocated specifically to any person or entity, either because the
26
27 businesses no longer exist, are unknown, and cannot be known, or because the refund
28
29 methodology was not tied to actual customer account usage and billing, but was based on an
30
31 estimation.
32

33 **a. RCW 63.29.080(2)**

34
35 RCW 63.29.080(2) specifically addresses utility refunds. However, the reach of that
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37 subsection goes only to those refunds specifically allocated to, but not claimed, by an
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39 identified customer:
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41 Any sum which a utility has been ordered to refund and which was
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43 received for utility services rendered in this state, together with any
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45 interest thereon, less any lawful deductions, that has remained
46
47 unclaimed by the person appearing on the records of the utility entitled
thereto for more than one year after the date it became payable in
accordance with the final determination

1 or order providing for the refund is presumed abandoned.
2
3 RCW 63.29.080(2) (emphasis added).
4

5 The language of this subsection clearly states that for a utility refund to be presumed
6 abandoned, it must remain unclaimed by a customer appearing on the utility's records as
7 entitled to the refund.¹¹ Significantly, the legislature used very specific language to define
8 which utility refunds are presumed abandoned. Instead of referring to the "owner" ¹² of the
9 property as it did in several other sections of the Act¹³, the legislature used even more
10 limiting language requiring the property to remain "unclaimed by the person appearing on the
11 records of the utility entitled thereto."
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18 In Broussard v. Louisiana Public Service Co., 548 So. 2d 940 (La. 1989), a factually
19 similar case, the Louisiana Supreme Court considered whether \$8 million remaining after the
20 telephone company refunded amounts to its customers should be treated as abandoned
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27 ¹¹ Thus, as discussed, supra, the 23,000 refund checks that were allocated to specific customers, but
28 returned uncashed to U S WEST, are presumed abandoned as defined in RCW 63.29.080.
29

30 ¹² According to the Act:
31

32 "Owner" means a depositor in the case of a deposit, a beneficiary in case of
33 a trust other than a deposit in trust, a creditor, claimant, or payee in the case of other
34 intangible property, or a person having a legal or equitable interest in property
35 subject to this chapter or his legal representative.
36

37 RCW 63.29.010(12).
38

39 ¹³ See RCW 63.29.020 (Property presumed abandoned--General rule); section .033 (Property
40 presumed abandoned--State or subdivision is originator or issuer); section .040 (Travelers checks and money
41 orders); section .050 (Checks, drafts, and similar instruments issued or certified by banking and financial
42 organizations); section .060 (Bank deposits and funds in financial organizations); section .080(1) (Deposits held
43 by utilities); section .090 (Refunds held by business associations); section .100 (Stock and other intangible
44 interests in business associations); section .110 (Property of business associations held in course of dissolution);
45 section .120 (Property held by agents and fiduciaries); section .130 (Property held by courts and public
46 agencies); section .140 (Gift certificates and credit memos); section .150 (Wages); and section .160 (Contents of
47 safe deposit box or other safekeeping repository).

1 property and escheat to the state under the Uniform Unclaimed Property Act.¹⁴ The court
2 placed significance on the fact that the remaining \$8 million "was neither earmarked for
3 particular past customers nor did it represent a specific overcharge to a particular number of
4 customers." Id. at 942. Rather, according to the court, the original refund amount was for "a
5 group of individuals or businesses which Bell suspected to have existed As it turned
6 out, Bell overestimated the amount which would be claimed by \$8 million." Id. Ultimately,
7 the court concluded that the \$8 million was not "presumed abandoned" under the statute:
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9

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11 The simple fact is that no part of the \$8 million has become payable (to
12 any known, much less identifiable former subscribers) in accordance
13 with a final determination or order providing for a refund.
14

15 Id. at 943.
16
17

18 Similarly, in this case, the \$26 million, which U S WEST has not been able to trace or
19 allocate to any specific customers, does not fall within the "utility refund" section of the
20 statute. These are not refunds "unclaimed by the person appearing on the records of the
21 utility entitled thereto." RCW 63.29.080(2). See also Market Street Ry. Co. v. Railroad
22 Comm'n, 28 Cal. 2d 363, 370, 171 P.2d 875, 880 (1946) (statute that addressed disposition of
23 utility refund excess accumulated during stay but which did not provide that unrefunded
24 excess should be paid into state treasury required court to exercise its "duty of disposing of
25 the moneys as the rights or equities of the parties may appear.") Accordingly,
26 RCW 63.29.080(2) does not apply.
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44 ¹⁴ The statute under which the court analyzed the refund in Broussard is similar to RCW 63.29.090,
45 governing business associations, which is discussed infra. Louisiana's Act, by definition, includes utility refunds
46 within the broad definition of business associations, unlike the Washington statute which has a separate section
47 for utility refunds. Although the court analyzed the statute under a different section of the Uniform Unclaimed
Property Act, the same analysis applies under RCW 63.29.080(2).

1 **b. RCW 63.29.090**

2
3 RCW 63.29.090 addresses business associations holding refunds that are presumed
4
5 abandoned. That section states:

6
7 Except to the extent otherwise ordered by the court or administrative
8 agency, any sum that a business association has been ordered to refund
9 by a court or administrative agency which has remained unclaimed by
10 the owner for more than one year after it became payable in accordance
11 with the final determination or order providing for the refund, whether
12 or not the final determination or order requires any person entitled to a
13 refund to make a claim for it, is presumed abandoned.
14

15
16 RCW 63.29.090 (emphasis added).
17

18 There are three reasons why this section of the Act does not apply here. First, this
19 section is more general than RCW 63.29.080(2), which specifically addresses utility refunds.
20
21 When two statutes arguably address the same situation, the more specific statute governs. As
22 the Washington Supreme Court held in State ex rel. Phillips v. Washington State Liquor
23 Control Board, 59 Wn.2d 565, 567, 369 P.2d 844 (1962), "[w]here there is any conflict
24 between a general and a specific statute, covering a subject in a more minute and definite
25 way, the latter will prevail." Because the previously analyzed statute, RCW 63.29.080(2),
26 specifically addresses utility refunds, that statute governs in this case, not the more general
27 statute.
28
29

30 Second, even if this more general subsection did apply, the funds are not identifiable
31 to a specific owner. So, the funds are not unclaimed by the owner, and hence not subject to
32 the statute. See Broussard, 548 So. 2d at 943.
33
34

35
36 Third, even if this subsection applied, its language gives this Court discretion for how
37 to use the funds. They do not simply escheat to the State. The first clause of RCW 63.29.090
38 makes this clear: "Except to the extent otherwise ordered by the court or administrative
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1 agency" Courts in other jurisdictions have relied on this prefatory language to dispose
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3 of funds in a manner other than escheat to the state under the Uniform Unclaimed Property
4
5 Act. See Harvey v. Oklahoma, 969 P.2d 367, 369 (Okla. Ct. App. 1998) ("[I]f the court or an
6
7 administrative agency such as [the Public Utilities] Commission provides for the disposition
8
9 of property, such property--even if 'unclaimed'--is excepted from the Act as property
10
11 'otherwise ordered' disposed of by the court or an administrative agency."); Broussard, 548
12
13 So. 2d at 944 (noting that the refund order directed that the case should remain open, thus
14
15 allowing the Commission to consider the disposition of any funds resulting from Central
16
17 Bell's inability to comply with the refund order). In the present case, the Court has
18
19 specifically retained jurisdiction over the refund process and over any funds that have not
20
21 been paid out. Supreme Court Remand Order at 3; Refund Implementation Order at 4.¹⁵
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29 ¹⁵ Nor does RCW 63.29.020(1) of the Act, which sets forth the general rule for property presumed
30
31 abandoned, apply to this case. That section provides:
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33 Except as otherwise provided by this chapter, all intangible property,
34 including any income or increment derived therefrom, less any lawful charges, that is
35 held, issued, or owing in the ordinary course of the holder's business and has
36 remained unclaimed by the owner for more than five years after it became payable or
37 distributable is presumed abandoned.
38

39 (Emphasis added.)
40

41 First, the legislature itself limited application of the general rule only to those situations not covered by
42 other sections of the statute. The introductory clause of RCW 63.29.020 provides that its rule regarding
43 property presumed abandoned applies in all cases "[e]xcept as otherwise provided by this chapter . . ." Second,
44 even without this language limiting application of the statute, as discussed above, the general rule would not
45 apply because utility refunds are specifically governed by another section of the Act--RCW 63.29.080(2).
46 Because the legislature specifically addressed utility refunds in RCW 63.29.080(2), the general rule contained in
47 RCW 63.29.020 does not apply.

1 **3. Under the Cy-Pres Doctrine, This Court Should Order the**
2 **\$26 Million to Be Distributed as Set Forth in the Joint Proposal**

3
4 **a. The Cy-Pres Doctrine**

5
6 The cy-pres doctrine allows this Court to order funds to be utilized for the next best
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8 purpose, where, as here, customers to which these refunds otherwise would have been
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10 allocated cannot be determined. See 2 A. Conte, Newberg on Class Actions § 10.17 at 10-41
11
12 (3d ed. 1992) ("The cy-pres doctrine originated with reference to the disposition of charitable
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14 trusts that would otherwise fail [It] puts the unclaimed funds to its next best
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16 compensation use").

17
18 Courts have applied the cy-pres doctrine to unclaimed utility refunds and to refunds
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20 ordered by regulatory agencies:

21
22 Cy pres (sometimes called fluid-class) distribution has traditionally
23 been used in cases in which class members are difficult to identify or
24 where they change constantly, as when a utility is found liable for
25 overcharging its customers. In these cases, the court, guided by the
26 parties' original purpose, directs that the unclaimed funds be
27 distributed "for the indirect prospective benefit of the class."

28
29 Id. § 10.17 at 97 (Cum. Supp. Dec. 1999) (citations omitted); Market St. Ry., 171 P.2d 875
30
31 (ordering street car company to use unclaimed funds to improve transportation facilities
32
33 rather than distributing funds to the state); United States v. Exxon Corp., 561 F. Supp. 816,
34
35 855-57 (D.D.C. 1983), aff'd in relevant part, 773 F.2d 1240, 1253 (Temp. Emer. Ct. App.
36
37 1985) (overcharges in violation of petroleum pricing regulations to be used by government
38
39 for energy conservation and related programs).

40
41 In Bebchick v. Public Utilities Comm'n, 318 F.2d 187 (D.C. Cir. 1963), the court
42
43 considered how to distribute a five cent refund needed to rectify an unauthorized increase on
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45 public transportation tokens. The court determined that it was "not feasible to require refunds
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47

1 to be made to individuals who paid the increase." Id. at 203. The court ordered that the
2 funds be used "for the benefit of the class who paid it, that is, those who use Transit." Id.
3

4 The court directed that a fund be set up and that the Public Utilities Commission be
5 directed to use its discretion to distribute such funds, "provided such discretion is exercised
6 consistently with the purpose of benefiting Transit users." Id. at 204. As an example, the
7 court indicated that "the fund might be used to cover costs which otherwise might lead to an
8 increase in fares, or might be used to aid in determining whether fares should be reduced now
9 or hereafter." Id. In a related case, the D.C. Circuit indicated that the "next best" class to
10 those who actually paid the increased fares "would be the current bus riders in the service
11 region from which the excessive fares were collected." Democratic Cent. Comm. v.
12 Washington Metro. Area Transit Comm'n, 84 F.3d 451, 455 (D.C. Cir. 1996).
13
14

15 Washington recognizes the cy-pres doctrine. See, e.g., Puget Sound Nat'l Bank of
16 Tacoma v. Easterday, 56 Wn.2d 937, 951, 350 P.2d 444 (1960). Although no reported
17 Washington appellate case has yet applied the doctrine to unclaimed or nonallocated
18 settlement funds, courts in several other jurisdictions, and the Ninth Circuit, have done so.
19 See Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1307 (9th Cir.
20 1990) (holding that the district court properly considered cy-pres distribution for unclaimed
21 funds from class action lawsuit against Arizona Citrus Growers); Nelson v. Greater Gadsden
22 Housing Authority, 802 F.2d 405, 409 (11th Cir. 1986) (allowing "fluid recovery" system for
23 unclaimed damages in tenant suit against housing authority to be used to increase energy
24 efficiency of apartments or improve apartment appliances); see also In re "Agent Orange"
25 Product Liability Litigation, 818 F.2d 179, 184-85 (2d Cir. 1987) (allowing district court
26 discretion to use parts of settlement fund in class action suit to fund programs consistent with
27 the underlying action).
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1 Additionally, King County trial courts have utilized the cy-pres doctrine to distribute
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3 class action settlement funds. See State v. Universal Underwriter's Life Ins. Co., King
4
5 County Superior Court No. 97-2-15752-8 SEA (May 1, 1998) (consent decree settling
6
7 Consumer Protection Act claim filed by State against life insurance company and directing
8
9 \$100,000 in restitution and arbitration programs to Legal Aid for Washington Fund and
10
11 Consumer Credit Counseling); State v. Resource Dealer Group, Inc., King County Superior
12
13 Court No. 97-2-15754-4 SEA (May 22, 1998) (consent decree settling Consumer Protection
14
15 Act claim against auto dealers alleged to have misrepresented monthly payments and price of
16
17 credit insurance, and ordering cy-pres payments to Legal Aid for Washington, the National
18
19 Consumer Law Center, and the Washington State Attorney General, Consumer Protection
20
21 Division for Consumer Education purposes); State v. American Fin. and Automotive Serv.,
22
23 King County Superior Court No. 97-2-23704-1 SEA (Sept. 18, 1997) (consent decree settling
24
25 Consumer Protection Act claim filed by State against auto financing service for alleged
26
27 misrepresentations and directing that \$100,000 be divided between Legal Aid for Washington
28
29 and Consumer Credit Counseling of Washington.) See also Zachman v. Whirlpool
30
31 Acceptance Corp., Okanogan County Superior Court No. 87-2-00223-5 (Dec. 28, 1995)
32
33 (order approving cy-pres settlement to several groups including Legal Aid for Washington
34
35 and Washington State Attorney General's Office Consumer Protection Division).
36

37 **b. The Joint Proposal**

38
39 The parties propose that \$26 million be used for the projects identified below.
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41 Complete descriptions of the projects are included at Jensen Aff., Attachment B. Briefly,
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43 these projects are:
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(1) E911

The current state emergency E911 system was originally designed using a single telephone number area code per geographic area and a single telecommunications carrier. With the advent of multiple telecommunications carriers and multiple area codes in a geographic area, two problems have arisen.

First, the E911 system now needs to recognize that telephone numbers are no longer specific to a single telecommunications carrier and may, in fact, involve multiple carriers. When a customer switches to a new carrier, the new carrier moves the customer's telephone number from the prior carrier by "porting" it to the new carrier. The E911 system needs to know the ultimate location of the ported number. This requires the deployment of new software modifications and rearrangement of existing E911 trunks.

Second, the E911 system now needs to recognize multiple telephone number area codes within the same geographic area. This also requires software enhancements.

Deployment of these network modifications and enhancements would protect the integrity of the E911 system and the data it relies on to ensure efficient and expedient dispatch of fire, police and aid to Washington residents. \$5.3 million would be allocated to this project. See Jensen Aff., Att. B.

(2) Community Voicemail

A substantial number of homeless and other persons in Washington do not have telephones. It is difficult for these people to find jobs, housing, maintain contact with family, caseworkers, day care providers, teachers and doctors, or to otherwise carry on their daily business without a dedicated telephone number. Through an existing program, this project would use an extensive computer system to provide each user with a telephone number, personal greeting and private passcode to retrieve messages--

1 service equivalent to a home answering machine. The system would operate 24 hours a day.
2
3 This system is in use in more than 30 communities across the country (six in Washington
4 State). It has assisted countless people in finding jobs and housing and maintaining vital
5 contact with caseworkers, family, doctors, caregivers, teachers and others. Under the project,
6
7 twelve communities in Western Washington which do not presently have this system would
8
9 receive it, and other systems in Western Washington, Yakima and Spokane would be
10
11 expanded. \$650,917 would be allocated to this project. See Jensen Aff., Att. B.
12
13

14
15 **(3) Telemedicine Services**
16

17 This project would fund a number of telecommunications-related health projects. It
18 would promote the efficient exchange of resources, give rural health care providers access to
19 vast medical resources otherwise unavailable to them, provide community health education
20 programs, allow tracking of patients at home and provide opportunities for continuing
21 education. \$3,928,660 would be allocated to this project. See Jensen Aff., Att. B.
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26

27 **(4) Washington State K-20 Program**
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29 This project would allocate \$5,028,000 to the Washington Department of Information
30 Services to use for projects to benefit education and libraries. This would establish funding
31 for the installation of internet access service in 68 library districts across Washington. See
32
33 Jensen Aff., Att. B.
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36

37 **(5) Community Economic Development**
38

39 Five million dollars would be allocated to support telecommunications projects of
40 general benefit to economic development in the State of Washington. Under this proposal,
41 the Community Economic Revitalization Board would solicit community economic
42 development proposals for a period not to exceed 90 days from the date of the Court's order,
43 and to make all funding decisions within 90 days after the
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expiration of the solicitation period. Projects within U S WEST's service area or with a strong community, regional intrastate or statewide benefit would receive priority. The following further criteria for selection of projects would apply:

- all projects must be related to telecommunications in Washington State;
- the funds disbursed must be spent on telecommunications services, equipment, or U S WEST infrastructure improvements necessary for the project, but funds may also be designated for operation expenses associated with telecommunications related development projects.
- preference will be given to projects that advance the broad public interest and provide community, statewide or intrastate-regional benefits.

See Jensen Aff., Att. B.

(6) Consumer Education and Outreach

Recent changes in the telecommunications environment across the nation have created new demands for telecommunications related consumer education and outreach programs. Consumers are frequently confused by numerous choices available to them from multiple telecommunications providers for a variety of telecommunications services. Two million dollars would be granted to the Seattle Foundation to support consumer education and outreach projects of general benefit to consumers in the State of Washington. See Jensen Aff., Att. B.

(7) Providing Telecommunications Services to Unserved Washington Areas

There are areas in Washington in which residential and business customers currently are unable to obtain telecommunications services due to the lack of telecommunications facilities. These areas are in eastern and southwestern Washington and are located outside

JOINT MOTION REGARDING
FINAL REFUND DISBURSEMENT - 20
[13141-0049/BA003684948.DOC]

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1 any telecommunications carrier's service territory, including U S WEST. These customers
2 have been unable to obtain service due to the high cost to the customers of obtaining service
3 and due to the lack of available telecommunications carriers that want to extend facilities to
4 these high-cost areas. U S WEST would extend its existing facilities and place new facilities
5 to serve such customers. These customers would receive service under the same rates and
6 conditions as customers currently served by U S WEST. \$900,000 would be allocated to this
7 project. See Jensen Aff., Att. B.

14
15 **(8) Network Infrastructure Improvements (Analog**
16 **Carrier System Replacement)**

17
18 The Commission envisions that the entire state will ultimately transition from analog
19 to digital carrier systems. The remaining funds (estimated at about \$3,192, 423) would be
20 designated for U S WEST network infrastructure improvements to replace existing analog
21 carrier systems with digital carrier systems. See Jensen Aff., Att.B.

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26
27 Any funds that remain after these projects are competed would be allocated to the K-
28 20 program. An escrow account will be set up for funds that require disbursement to projects.
29 A separate account will also be set up to track credits for infrastructure expenses incurred by
30 U S WEST. See Jensen Aff, Att. B. A summary of the funds allocated per project, and
31 whether they are for the infrastructure account, the escrow account, or grants, are set forth at
32 Jensen Aff., Att.C.

33
34 **c. Distribution to the Projects Identified in the Joint Proposal**
35 **Is Appropriate Under the Cy-Pres Doctrine**

36
37 The cy-pres doctrine allows the Court to distribute funds to the next best use where
38 the prospective beneficiaries "are difficult to identify or where they change constantly, as
39

1 when a utility is found liable for overcharging its customers." Newberg On Class Actions,
2
3 supra, § 10.17, 1997 Cum. Supp. at 97. The Court puts the fund "to its next best
4
5 compensation use, e.g., for the aggregate, indirect, prospective benefit of the class"
6
7 Newberg On Class Actions, § 10-17 at 10-41.

8
9 Courts have broad discretion in shaping equitable distribution of such funds. A
10
11 cy-pres distribution may be rejected only when it is too remote from the injured class and
12
13 "there is no reasonable certainty that any member will be benefited." Arizona Citrus
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15 Growers, 904 F.2d at 1308 (emphasis added).

16
17 In Nelson v. Greater Gadsen Housing Authority, supra, for example, the Eleventh
18
19 Circuit upheld the district court's cy-pres distribution of damages in a class action suit against
20
21 a landlord for failure to grant tenants an allowance for utility usage required by federal
22
23 regulations. Any compensatory damages not claimed within a set time were to be used by the
24
25 landlord to increase the energy efficiency of apartments or improve appliances supplied to the
26
27 apartments. Nelson, 802 F.2d at 409.

28
29 In West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd,
30
31 440 F.2d 1079 (2d Cir. 1971), the court approved a settlement plan providing for allocation
32
33 of \$100 million among various claimants in a consolidated antitrust class action arising from
34
35 the sale of antibiotic drugs. The plan provided that court approval could be sought to apply
36
37 unclaimed damages to public health purposes.

38
39 Likewise, in Market St. Ry., 171 P.2d 875, the court ordered a street car company to
40
41 use unclaimed refunds to improve transportation facilities. In EXXON Corp., 561 F. Supp. at
42
43 855-57, the court ordered petroleum overcharges to be used for energy conservation and
44
45 related programs. In Bebchick v. Public Utilities Comm'n, 318 F.2d at 203, the court found
46
47 that it was not feasible to require refunds to transit customers that had overpaid, and instead

1 ordered that a fund be set up for the purpose of benefiting transit users.

2
3 As noted earlier in this motion, it appears that the funds at issue arise primarily from
4 the business services part of the refund process. Because U S WEST cannot reach the
5 customers of the various U S WEST business services that are believed to be the genesis of
6 the fund at issue in the present case, it is appropriate for the Court to make a disposition that
7 indirectly benefits the class. Because the genesis of this fund is in part businesses that have
8 left the state, or have discontinued operations, the true beneficiaries include the customers of
9 those businesses, as these customers doubtless paid (through the cost of products or services)
10 for the expenses of the businesses, including telephone service. The majority of these
11 consumers likely remain in the area, and would include not just U S WEST ratepayers, but
12 also consumers who may not subscribe to U S WEST service, but were customers of these
13 businesses.¹⁶ Therefore, under the cy-pres doctrine, this Court can order the fund to be used
14 for projects that will generally benefit Washington consumers.

15
16 Each of the projects identified in the Joint Proposal would benefit Washington
17 consumers including U S WEST customers. Many would provide a very direct benefit (e.g.,
18 E911 service upgrades, education and libraries) to this class as a whole. Others, though
19 somewhat less direct, would also provide substantial benefits to Washington consumers
20 (including the Community Economic Development, analog carrier, unserved areas
21 deployment, consumer education and telemedicine proposals.) Community voicemail would
22 benefit businesses, and the community as a whole, by assisting homeless and other persons
23 without telephones to find jobs and housing. The scope of the projects is broad, ensuring that

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¹⁶ While U S WEST believes that the fund apparently derives from business services, U S WEST believes that the customers that contributed to it are not current business customers or past customers that can be located. Current customers, and past customers who received refunds, have been fully compensated.

1 virtually all consumers located in areas served by U S WEST, as well as U S WEST's
2 business and residential customers, and other Washington state consumers, will receive some
3 benefit. Accordingly, this Court should approve the Joint Proposal.
4
5

6
7 **4. The Fact That the Joint Proposal Was Reached Through a**
8 **Settlement Provides Another Independent Reason Why the Court**
9 **Should Approve It**
10

11 In Washington, strong public policy favors the settlement of litigated disputes.
12
13 Harding v. Will, 81 Wn.2d 132, 138, 500 P.2d 91 (1972) ("Compromises are favored in the
14 law"); Metropolitan Life Ins. Co. v. Ritz, 70 Wn.2d 317, 321, 422 P.2d 780 (1967); ("We
15 have made clear that amicable settlements and releases of unliquidated claims are favored as
16 a desirable method of avoiding unnecessary and expensive litigation."). In Van Bronkhorst v.
17 Safeco Corp., 529 F.2d 943 (9th Cir. 1976), a class action employment discrimination suit,
18 the appellate court affirmed dismissal of the EEOC's challenge to a consent decree, noting
19 that "there is an overriding public interest in settling and quieting litigation," particularly in
20 cases, such as class action suits, which are expensive and difficult to manage. Id. at 950.
21
22

23 Especially in light of the clear public policy favoring settlement, this Court should
24 approve the Joint Proposal which was reached through a negotiated settlement. When a
25 settlement offered is fair, reasonable, and adequate, the Court should approve it. See Pfizer,
26 314 F. Supp. at 740. In Pfizer, the court noted that in order to determine whether a settlement
27 offer is fair, reasonable, and adequate, the court should look at the extent of support from
28 interested parties and the presence or absence of good faith bargaining. Id. at 741. "[S]trong
29 support for the proposed compromise is a factor of great weight." Id. at 743; see Linney v.
30 Cellular Alaska Partnership, 151 F.3d 1234, 1242 (9th Cir. 1998) (balancing several factors
31 in determining whether settlement was fundamentally fair, adequate, and reasonable,
32 including the experience and views of counsel, the presence of
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1 a governmental participant, and the reaction of the class members to the proposed
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3 settlement).

4
5 In this case, the parties agree on the proposed disposition of this case. Public Counsel
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7 is statutorily charged with representing and appearing for the people of the State of
8
9 Washington. Counsel for the WUTC represents the Commission itself, which endorses this
10
11 proposal.¹⁷

12
13 This Joint Proposal was developed after months of discussions, and is a considered
14
15 and highly negotiated proposal. See Lyons v. Marrud, Inc., No. 66 CIV 415, 1972 U.S. Dist.
16
17 LEXIS 13401, at *2 (S.D.N.Y. June 6, 1972) (approving settlement after extensive
18
19 negotiations during which it appeared that parties had bargained sincerely and with best
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21 interest of their clients in mind). It has the support of representatives charged with looking
22
23 out for the best interests of utility customers and consumers, as well as from consumer group
24
25 intervenors. Accordingly, this Court should approve the Joint Proposal.

26 27 VI. CONCLUSION

28
29 The WUTC, Public Counsel, U S WEST, AARP and TRACER respectfully request
30
31 that this Court rule that the 23,000 refund checks, mailed to specific customers but returned
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33 uncashed, be presumed abandoned and subject to the custody of the state, and further order
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35 that U S WEST fund the programs identified herein as a full and complete discharge of any
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37 remaining refund liability in this case.

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41
42 ¹⁷ The Public Counsel, by statute, is responsible for representing and appearing for the people of the
43 State of Washington in all actions and proceedings involving any questions under RCW Title 80. See RCW
44 80.01.100; U S West Comm., Inc. v. Washington Util. and Transp. Comm'n, 134 Wn.2d 74, Ad. n.2 (1997)
45 ("Public Counsel refers to the Public Counsel Section of the State Attorney General's office. Public Counsel
46 represents the people of the state in utility regulatory matters as a statutory party.") The Washington Supreme
47 Court has recognized that the Public Counsel adequately represents consumer interests in the State of
Washington. Power v. Washington Water Power Co., 99 Wn.2d 289, 295-96, 662 P.2d 374 (1983).

1 DATED: _____, 2000.
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